equal footing with other information providers.[49] In short, "[T]he public interest in diverse . . . options is best served by deferring to the marketplace."[50]

44. Moreover, it has long been held that regulations that impose First Amendment burdens on speech must be closely tailored to further an important government interest.[51] If diversity is the interest served by the ownership rules, then the regulations are overinclusive. One has only to look at the diversity of programming and sources in most major markets to realize that these concerns are overstated.

45. For the reasons advanced above, the continued enforcement of the Newspaper-Broadcast Cross-ownership rule no longer serve the public interest and raise serious questions of consistency with First Amendment principles. It is clear that, absent a sufficiently important and continuing compelling governmental interest, regulations which either directly abridge freedom of expression or, by their application restrict such expression, are constitutionally suspect. *United States v. O'Brien, supra.*

46. There can be no dispute over whether NBCO restrictions impinge upon the broadcaster's First Amendment rights. Although the regulation professes

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[49]The incredible explosion of electronic mass media outlets, including Cable TV with audio channels, Direct Audio Radio Services ("DARS"), Direct Broadcast Television Service ("DBS"), MDS, IVDS, electronic billboards compact disks, video games for home computers, telephone dial-up audio programming services, local computer bulletin board services ("BBS"), and the vast reaches of cyberspace *via* the Internet–all new and competing technologies since the adoption of the NBCO Rules in 1975–has placed the information consumer in a position of having too many, not too few, choices to obtain information and other programming. All of these "real time" information sources compete for the attention and dollars of the information consumer, who only has 24 hours in a day to partake of these varied services.

[50]*Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985).

[51]*United States v. O'Brien*, 391 U.S. at 377 (1968).

to be content neutral, restricting only common ownership of broadcast facilities and daily newspapers in the same market, and not the content of their expression, those regulations discriminate among speakers in the mass media market, based on the nature of the medium used for speech, and are thus highly suspect. Further, the entire *basis* for the rule is the assumption, by the Commission, that common ownership will necessarily mean common editorial and other policies—clearly a *content*-based regulation. It necessarily follows that restrictions on ownership impinge directly on freedom of expression by determining who may speak and who may not. The rules dictate where a broadcaster may exercise his freedom of expression, which is contrary to the well established principle that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right – especially the right to freedom of expression.[52] Moreover, given the current availability of programming and other information sources, it cannot be concluded that the present multiple ownership rules are sufficiently narrowly tailored to meet the standards set forth in *United States v. O'Brien, supra.* Certain broadcasters are denied the right to acquire additional broadcast licenses solely because the government is trying to promote goals that have already been achieved – diversity of opinion and marketplace competition.

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[52]*See, Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U.S. 618 (1968). See also, *Buckley v. Valeo*, 424 U.S. 1 (1974), wherein the Court held that forced choices in the Federal Election Campaign Act which limited expenditures of individuals or groups supporting a candidate were held to be an unconstitutional abridgment of freedom of speech. In striking down that part of the legislation, the Court rejected the notion that Government, under the Constitution, could act to equalize the relative ability of individuals and groups to influence the outcome of elections. Rather, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment..." 424 U.S., at 48-49.

47. A government regulation which restricts or otherwise has an adverse impact on an individual's or group's freedom of expression is justified only to the extent that (a) it furthers an important or substantial governmental interest (*i.e.*, one that addresses an evil that the government has the right to prevent), (b) is unrelated to the suppression of content of speech, or (c) the incidental restriction upon freedom of expression caused by enforcement of the regulation is no greater than necessary to achieve that interest. *United States v. O'Brien, supra.*

48. The two primary reasons why the FCC adopted numerical ownership restrictions and the duopoly and one-to-a-market rules were to further the policy of promoting diversity of viewpoints in media markets, and prevent monopolistic practices within the broadcast industry. Both goals were in turn based upon the scarcity rationale, and the need to ensure that all markets were provided with a sufficient diversity of viewpoints. Under the circumstances existing when the rules were first promulgated, the rules were justified under the *O'Brien* test set forth above.[53] However, given the fact that the Commission has officially proclaimed that the goal of diversity has been achieved in virtually all media markets, it must follow that restrictions on freedom of expression can no longer be justified by reference to such a goal. It has been observed that scarcity is an inappropriate basis for broadcast regulation of First Amendment speech.[54] Even assuming that scarcity

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[53]*See also, Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Mt. Mansfield Television v. FCC*, 442 F.2d 470, 21 RR 2d 2087 (2d Cir. 1971).

[54]In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 61 RR 2d, 330, *reh. denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), the court noted that use of the scarcity rationale as an analytic tool in connection with new technologies inevitably leads to strained reasoning and artificial results.

(continued...)

should serve as a standard for government oversight, it is well established that the scarcity rationale no longer exists. The Commission has, on numerous occasions, emphasized that there is a sufficient increase in the number and diversity of program outlets to warrant a variety of deregulatory actions.[55] Except for a handful of "egregious cases," where antitrust considerations might warrant some scrutiny of media ownership, such diversity guarantees an absence of monopolization of the means of expression in a given media market. Whatever validity the current NBCO rules may once have had, it no longer exists.

49. Where the underlying public interest consideration for a regulation is no longer valid, the rule cannot withstand constitutional scrutiny. *See, Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears."); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) ("[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem

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[54](...continued)

> "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of Broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." *(footnotes omitted)*

61 RR 2d at 337.

[55]*See, e.g., Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17 (1984), *recon.*, 100 FCC 2d 74 (1985) (revising the seven-station rule to permit ownership of up to twelve stations); *Fairness Doctrine Alternatives*, 2 FCC Rcd 5272 (1987), *recon.*, 3 FCC Rcd 2035 (1988), *aff'd. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (eliminating the fairness doctrine as unnecessary because of the diversity of voices and opinion in broadcast and other media).

does not exist." [citations omitted]). Accordingly, FOE submits that the Newspaper-Broadcast Cross-ownership rules that presently restrict common ownership of daily newspapers and commercial radio stations be eliminated.

50. Alternatively, FOE would recommend that the Commission narrowly tailor its NBCO rules to prohibit newspaper-radio cross-ownership only in "egregious cases," *i.e.*, those radio markets[56] where less than two (2) other independently-owned mass media voices[57] would continue to exist following the acquisition or merger. FOE acknowledges that few, if any markets would have so few outlets, which is simply to acknowledge that the goal of diversity of voices has already been met. To restrain the broadcast media, where other electronic and print media have no such restrictions, is to warp the playing field, giving a competitive advantage to those media. It is time to level that playing field, and to let the market decide which voices will prevail, both economically, and in the hearts and minds of the people.

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[56]The definition of radio market is, obviously, imprecise. FOE would propose that the Commission adopt the definition that is contained in §73.3555(a) of the Rules pertaining to local radio ownership.

[57]Since the NBCO rules pertain to a form of mass media crossownership, logic dictates that the counting of other independent "voices" in such a market should not be limited merely to commercial radio stations, but should include commercial *and* noncommercial radio and television stations, cable television systems, MDS licensees, and other daily newspapers having significant circulation within the defined market.

CONCLUSION

WHEREFORE, the above premises considered, FOE respectfully urges the Commission, to amend its ownership rules, by REPEALING Section 73.3555(c) (the One-to-a-Market Rule) in its entirety, and by REPEALING Section 73.3555(d), the Newspaper-Broadcast Crossownership Rule, with respect to the common ownership of a daily newspaper and a commercial radio station or stations. ALTERNATIVELY, the rules should be substantially relaxed to apply only to "egregious cases," as set forth above.[58]

FURTHER, the Commission should refrain from adopting new rules or modifying Section 73.3555(a) with respect to local radio ownership.

Respectfully submitted,

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[58] *See* note 7, *supra.* and ¶50 *supra*, and accompanying note.